No. 11908

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INLAND EMPIRE PAPER COMPANY, a corporation,
Appellant,
vs.
HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation,
Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States for the Eastern District of Washington

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JURISDICTION

This action was brought by the plaintiff, Inland Empire Paper Company, a Washington corporation, citizen and resident, hereinafter called Paper Company, against defendant, The Hartford Steam Boiler Inspection and Insurance Company, a corporation, citizen and resident of the State of Connecticut, hereinafter called Insurance Company. The action was predicated upon a policy of insurance issued by the Insurance Company covering a certain Sumner Steam Engine owned and operated by the Paper Company and for loss and damages in the sum of $16,173.81 to property of the Paper Company.

The controversy was therefore a controversy which at the time of the commencement of the action was and still is entirely between citizens of entirely different states, and the amount in controversy is and was at the time of the commencement of the action in excess of the sum of $3,000.

Jurisdiction of the District Court existed under Section 41, Title 28, U.S.C.A., Judicial Code, Section 24 amended. The appeal to this Court is from the final judgment denying relief to plaintiff entered January 16, 1948, and from an order denying plaintiff's alternative motion for a new trial or for entry of plaintiff's requested findings and entry of appropriate judgment thereon, entered the 10th day of February, 1948. Notice of appeal was filed in the office of the Clerk of the District Court on the 15th day of

March, 1948, and jurisdiction is believed to exist under Sec. 225 (a) First, and (d), Title 28, U.S.C.A., Judicial Code, Sec. 128 amended. (Tr. 35 to 40).

STATEMENT OF THE CASE

This is a suit based upon a certain policy or contract of insurance issued by defendant to plaintiff, effective May 5, 1944, whereunder plaintiff seeks to recover for loss on its property directly damaged by a certain accident of July 3, 1946. The District Court held that the plaintiff had failed to maintain the burden of proving that the damage shown (which was undisputed) came within the terms of the policy of insurance. (Tr. 448).

The plaintiff, Inland Empire Paper Company, hereinafter called the "Paper Company," is a Washington corporation located at Millwood, Washington, approximately 7 miles from the center of the City of Spokane, Washington, engaged in the manufacture of newsprint paper. The defendant, The Hartford Steam Boiler Inspection and Insurance Company, hereinafter called the "Insurance Company," is a Connecticut corporation engaged in writing boiler and machinery insurance. (Tr. 3, 44-45, 52).

The Paper Company was the owner of certain paper making machinery, including a Sumner Steam Engine. (Ex. 8). The Sumner Steam Engine was directly connected to the paper machinery by belts through a line shaft. The Sumner Steam Engine and the line shaft were located in the basement floor of the plant

of the Paper Company. The line shaft, at the time of the loss, consisted of about 139 feet of shafting and 8 pulleys with suitable bearings, sole plates and couplings. This line shaft was located approximately 20 feet west of the Sumner Steam Engine and was connected with the Sumner Steam Engine by a 22-inch rubber belt. (Plaintiff's Ex. 2, 3 and 4).

On the 5th day of May, 1944, at Spokane, Washington, the Insurance Company, through its authorized representative, in consideration of $8,914.42, which the Paper Company then paid, executed to the plaintiff a policy of insurance upon the Sumner Steam Engine.

An "accident" within the purview and coverage of said policy was specifically defined and limited therein as follows by Schedule 6, paragraph C:

> "C. As respects any object described in this Schedule, 'Accident' shall mean a sudden and accidental breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaghragm, shall not constitute an accident, nor shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident."

Said policy of insurance, Schedule 6, paragraph B, sub-paragraph (a) defines an object as follows:

"B. (a) As respects any such engine, 'Object' shall mean the complete engine so described (which shall include any apparatus used as an auxiliary in the operation of the engine and mounted on its frame, and all interconnecting piping between parts of the engine), but shall not include any piping leading to or from the engine, nor the condenser or its connecting pipe (or adapter), nor any electrical machine (other than a governor motor) or part thereof whether mounted with the engine on a common shaft or bed or otherwise, nor any foundation or other structure supporting the engine, nor any mechanism, appliance or shafting connected to the engine by belts, ropes, chains, couplings, gears, pipes or other means."

The Sumner Steam Engine was connected to a main line shaft of a "No. 4 Paper Machine" located in the basement of Paper Company's plant and the main line shaft in turn was connected to the No. 4 Paper Machine itself located on the first floor of Paper Company's plant directly above and connected to the Sumner Steam Engine by belts through the main line shaft. The Sumner Steam Engine and the main line shaft downstairs and the No. 4 Paper Machine upstairs were one complete unit, the only source of power of which was the Sumner Steam Engine.

There were three control devices of the Sumner Steam Engine by which its speed should have been controlled: (1) a Pickering Governor (Ex. 8), (2) a Brownell Overspeed Stop (Ex. 11) and (3) a Hand-pull Safety Chain (Ex. 9). These had all been inspected by the Insurance Company on December 16, 1945, and passed as satisfactory.

On July 3, 1946, while the Sumner Steam Engine was driving the No. 4 Paper Machine through its connection with said main line shaft, the first control device on the engine, the Pickering Governor, failed to function because a leather belt broke, causing a sudden overspeed of the engine. This control device had for its purpose the maintenance of a constant speed of the Sumner Steam Engine. The Pickering Governor was driven by a leather belt from the Sumner Steam Engine as shown by plaintiff's Exhibit 8. The leather belt was a part of the Pickering Governor, and the Pickering Governor was a part of the Sumner Steam Engine. It is undisputed that the Pickering Governor belt broke. The Paper Company maintained this broken belt was the cause of the accident and the Insurance Company maintained it was the result of the accident, occurring after the damage. Steam came into the Sumner Steam Engine through a main steam line. The two other control devices were designed to operate a butterfly safety valve in the main steam line to the Sumner Steam Engine. This butterfly valve turned in the steam line like a hand damper on an old fashioned wood stove. The second control device was an automatic device located on the Sumner Steam Engine flywheel driving pulley itself which operated by centrifugal force and was called a Brownell Overspeed Stop. The third control device was the Handpull Safety Chain, a safety chain which could be operated manually by men working on the main floor on the No. 4 Paper Machine above the Sumner Steam Engine as shown by

Exhibit 9 (handle connecting end of safety chain on operating floor) and Exhibit 8 (chain going through floor to Sumner Steam Engine).

It was the theory of the Paper Company that the belt of the Pickering Governor broke (which was undisputed) and that the safety stop on the Pickering Governor failed to function (which was disputed), because of a loose set screw; that the Sumner Steam Engine speeded to at least three or four times its normal speed (which was undisputed); that this excessive speed was far above that at which the Brownell Overspeed Stop had been set to operate (which was undisputed) and that the Brownell Overspeed Stop never functioned normally to close the butterfly valve (which was disputed) and that the Handpull Safety Chain device broke and also did not function to close the butterfly valve (which cannot be disputed).

An understanding of these three control devices is essential.

1. PICKERING GOVERNOR

The Pickering Governor was a ball-type throttle governor designed to maintain a constant speed on the engine. The engine had to be set at a constant speed for driving the No. 4 Paper Machine, depending on the type of paper being made. This had to be a constant speed, because otherwise the paper would break into pieces on the press rolls upstairs and would be thrown in the air. The paper speed on the No. 4 machine at the time of the loss was set for approxi-

mately 346 lineal feet per minute paper speed, which corresponded to an engine speed of about 138 revolutions per minute. The term 346 lineal feet per minute "paper speed" means that there were 346 lineal feet of paper coming out of the No. 4 Paper Machine, shown on Exhibit 1, per minute. The very highest speed that the No. 4 machine had ever manufactured any paper was 690 lineal feet per minute paper speed, which corresponded to an engine speed of approximately 270 revolutions per minute. (Tr. 209). However, this maximum speed was almost double the speed the paper machine was set to operate at the time of the damage. (Tr. 209). There was a constant fixed relationship between this "paper speed" and the speed of the engine. The speed of the engine in revolutions per minute, or R.P.M., times 2.52 (a constant formula factor) would give the paper speed approximately.

The Safety Stop on the Pickering Governor

There had been a safety device placed upon the Pickering Governor to stop the engine in the event that the belt of the Pickering Governor broke. This has been placed on it by the Paper Company at the specific recommendation of the Insurance Company. (Tr. 223-224, Ex. 15, 16 and 17). Prior to the time this safety device had been placed upon the Pickering Governor, the Paper Company had been dependent upon the Brownell Overspeed Stop stopping the engine in case of the belt breaking on the Pickering Governor. (Tr. 223-224). This safety device on the Pickering Governor is shown in Exhibit 8. The

manner in which it operated was that an idler pulley rode on the belt between the governor and the engine. If this belt between the governor pulley and the engine pulley should break, then this idler rider pulley being counterbalanced by a weight (shown in the lower left-hand corner of Exhibit 8) would come up and release the Pickering Governor and close the valve on the Pickering Governor, stopping the engine. When the tension of the belt was removed, this weight fell down and the idler pulley ran up and tripped the mechanism on the Pickering Governor. (Tr. 137-139).

It was the theory of the Paper Company that after the belt broke on the Pickering Governor, this safety device failed to trip, because of a loose set screw, and the other control devices, hereinafter described, also failed to function, and the Sumner Steam Engine overspeeded and a general wreck resulted. (Tr. 209). It was undisputed and admitted by both parties that if the automatic safety stop on the Pickering Governor had been tripped, the engine could not have overspeeded. (Tr. 321-322).

2. BROWNELL OVERSPEED STOP

The Brownell Overspeed Stop was also a safety device to stop the engine in case of an overspeed by closing the main steam line. This was accomplished by means of a ball and spring located on the flywheel of the Sumner Steam Engine, which, under centrifugal force, was cast outward and in turn released a

trigger fastened to the frame of the engine, (Ex. 11), which trigger, when released, allowed the butterfly valve on the main steam line to close. The butterfly valve consisted of a body with a disk pivoted in the center used for the emergency closing of the main steam line. It was like an old fashioned damper on an old fashioned wood stove. (Ex. 8).

This trigger of the Brownell Overspeed Stop was only about one-half an inch away from the main belt of the Sumner Steam Engine to the line shaft pulleys, (Tr. 188) and is marked with the letter "T" in the center of Exhibit 11. The trigger could be tripped by hand or by accidentally coming in contact with the engine belt.

The Brownell Overspeed Stop was set to operate at the time of the accident when the No. 4 Paper Machine upstairs attained a paper speed of 700 lineal feet per second and an engine speed of 277 R.P.M.'s. Overspeed tests on this Brownell Overspeed Stop had been made two or three months before the accident and the Brownell Overspeed Stop had tripped at that point of 277 R.P.M.'s. (Tr. 196-197).

3. HANDPULL SAFETY CHAIN

The butterfly valve was operated, in addition to the Brownell Overspeed Stop, by a Handpull Safety Chain. One end of this chain was attached to a hand trip located alongside the dryers of the No. 4 Paper Machine on the floor above the Sumner Steam En-

gine. (Plaintiff Ex. 9). This Safety Chain went through the floor above the Sumner Steam Engine (Plaintiff Ex. 10) and was attached to the butterfly valve lever by means of a draw pin. (Ex. 8 and 10). There was a weight that worked as a lever which turned the butterfly valve to a position to shut it off against the flow of steam like an old fashioned damper on an old fashioned wood stove. (Tr. 136, 301). By pulling the handpull upstairs the draw pin downstairs could be withdrawn and a weight released which would drop down and close the butterfly valve. The draw pin held this weight in place so that as long as the draw pin remained in the loops of the chain, the weight could not drop down and close the butterfly valve. (Tr. 136). Although this handpull was operated upstairs by workmen when the machinery ran away, this draw pin was never quite pulled out of the loops of the chain downstairs, (Tr. 124-125) so that pulling the handle upstairs had failed to operate to turn the butterfly valve downstairs to a position to shut off the steam feeding the engine. (Tr. 134-135). This was undisputed at the trial, but the Trial Court, whose theory was that the Brownell Overspeed Stop had functioned in a normal manner, apparently must have also considered that the Handpull Safety Chain had functioned in a normal manner. The Court said:

> "We also have to assume, which has been pointed out here as rather improbable, to me, that although this hand safety stop had been set up, connected with a chain to the butterfly valve extending up into the upper room, where the

paper machine was operating, a convenient handhold in the floor, the men evidently had been instructed about it, knew it was there, and when this evidence of speeding was noticeable they ran over and they pulled that, and no doubt pulled it violently and *in a way that should have made it work.*" (Tr. 451). (Underlining ours).

The Sumner Steam Engine, the main line shaft and the No. 4 Paper Machine as a single unit were damaged by this overspeed as follows:

Paper Machine

The basement line shaft of said paper machine was twisted from one end to the other for a distance of more than 75 feet, with the result that all six couplings on said line shaft were damaged, and the eight pulleys mounted on said line shaft were all broken; the bearings supporting this line shaft were all damaged; the tops of two concrete piers supporting said line shaft were broken; two driven pulleys on the main floor above said basement line shaft were broken. The shafts supporting these two pulleys were twisted and damaged as well as certain miscellaneous other damage to the paper machine proper. In addition to said damage, the main engine belt was broken as well as all belts driving the different sections. Flying debris damaged fourdrinier wire and further damaged several table rolls.

Sumner Steam Engine

Broken lubricator lines, broken lubricator, several broken guards and damage to steam lines.

Plant

Various doors and windows, as well as a spare Pickering Governor were damaged and broken by flying debris.

The Paper Company notified Insurance Company's agents in Spokane immediately by telephone of the accident and these agents in turn notified the Seattle Office of Insurance Company, and Insurance Company's Seattle representative phoned Paper Company the evening of July 3 and was further informed of said accident by Paper Company. The Seattle representative, together with other representatives of Insurance Company inspected said damage on July 5, 1946, and on the following day Paper Company furnished Insurance Company with written notice of said accident and subsequently otherwise performed all the conditions of said policy on its part. With the knowledge of the Insurance Company, Paper Company called in the Union Iron Works of Spokane, which had made part of said machinery and equipment, and with the knowledge of representatives of the Insurance Company, the situation was appraised by the representatives of said Union Iron Works of Spokane, and said Union Iron Works of Spokane was given an order to make certain castings, line shaft bearings and other work which the Paper Company was not able to do with its own men and equipment under the circumstances. This work included nine pulleys to be cast, machined and balanced, as well as replacing the entire line shaft with couplings and bearings; other work such as wrecking the damaged equipment, replacing the broken piers and erecting all equipment as it was received, as well as machine work on shafting and general repair work while waiting for the new equipment, was

done by the maintenance crew of Paper Company with the knowledge of the Insurance Company. This machinery, engine and other equipment was not purchased, repaired, assembled and tried until July 29, 1946, when Paper Company was able to once more use said Sumner Steam Engine to drive said paper machine.

That for its claim for the direct loss suffered during the period July 3 to July 29, 1946, as a result of said accident of July 3, 1946, Paper Company submitted on September 17, 1946, to Insurance Company a statement of its loss in words and figures as follows:

"Debit Memorandum
from
Inland Empire Paper Company
Millwood, Washington
September 12, 1946

To Hartford Steam Boiler Ins.
& Ins. Co.
707 Artic Bldg.
Seattle, Washington
We debit your account as follows:
Overspeeding Engine No. 4 Accident,

1:45 P. M. July 3, 1946.

Use and Occupancy	$ 7,350.00
Repair, Labor, straight time, see Sheet B.	2,524.57
Repair Labor, premium time, see Sheet B.	321.19
Miscellaneous Repair parts drawn from Store Account, see Foreman's Requisitions attached	448.54
Miscellaneous Repairs, not accomplished, see Sheet C	410.42
Loss of Fourdrinier Wire, see Sheet D	198.52

Belting of Drives, see Sheet E	280.74
Union Iron Works, Invoice 360566	4,623.77
Supervision and overhead	16.06
	$16,173.81

Misc. In.	7,366.06
Belting	280.74
Store	5,482.73
Wires	198.52
Rep. Lbr.	2,845.76

Inland Empire Paper Company"

On October 18, 1946, Insurance Company denied liability therefor under said policy and subsequently this suit was brought. When the plaintiff rested, the defendant moved for a non-suit on the ground that the plaintiff had failed to sustain the burden of proof to show that it was entitled to recover under the policy for the reason that the stipulated damage was not directly caused by any accidental breaking of any portion of an insured object directly under the terms of the policy. (Tr. 261-262). The Court took this motion under advisement, (Tr. 262-263) and at the conclusion of the testimony and after argument of counsel, ruled that the plaintiff had failed to maintain the burden of proving that the damage to the machinery came within the terms of the policy of insurance. (Tr. 448-449). While he did not make any extended or exhaustive review of the evidence, the Trial Court stated the basis for his ruling, which, in part, was that even if the safety stop on the Pickering Governor had failed to work, (Tr. 450), the Brownell Overspeed Stop did work (Tr. 450), or at least the Handpull Safety Chain worked (Tr. 451)

so that the butterfly valve was closed partially, (Tr. 451), but his conclusion was that the butterfly valve at the time of the accident was in such a defective condition that it not only would not stop the engine, but wouldn't even reduce its speed to the idling speed. (Tr. 451).

The Trial Court apparently thought great significance should be attached to the fact that the Sumner Steam Engine was idling after the accident "with practically all of the load removed, because by that time the whole shaft had been thrown out, the main drive belt was off the driven pulley, at least, and there wasn't any load on the engine; it was running free." The Trial Court apparently disregarded the undisputed testimony that the dis-engaging of the independent clutches on the machinery neither increased nor decreased the speed of the engine, (Tr. 114-115), and the testimony that the flywheel of the engine had gone to a speed of 800 R. P. M.'s without the Brownell operating, (Tr. 159-160) and that the violence of the pulls on the Handpull actually broke the lever on the Handpull Safety Chain. As stated, this last evidence was offered to the Court in the form of an affidavit of Fred Beguelin, the master mechanic of the Paper Company, in support of the alternative motion for a new trial, which was argued earnestly in an effort to have the Trial Court open the judgment in favor of the defendant, which was entered January 16, 1948, and take additional testimony on the point. The motion was denied.

The main question the District Court had to decide on these facts was whether or not there was an accident within the purview of the policy.

Specifications of Error

Admission and Rejection of Evidence Pickering Governor

(1) The District Court erred in admitting and considering in evidence over plaintiff's objection testimoney of the defendant showing a certain experiment conducted with respect to the Pickering Governor on August 3, 1948, after the accident under conditions dissimilar to the operating conditions of the engine at the time of the accident, whereby it was sought to be shown by the defendant that the Safety Stop of the Pickering Governor must have functioned. (Tr. 314). The grounds urged at the trial for the plaintiff's objection were:

> "Mr. Kelley: Just for the record, so that I won't be interrupting, if your Honor will allow me an objection to all the line of testimony with respect to tests carried on from the month of August on, for the reason that what may have existed as to the condition of the Pickering Governor or the Brownell overspeed stop *after* the initial inspections of Wheeler the day of the accident and Mr. Fullmer and Mr. Olinger a few days after the accident, and up to and including July 10, would be inadmissible, because the evidence as existed at the date of the accident." (Italics ours) (Tr. 314).

(2) The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of defendants' witness, Philip McKeon, and in denying plaintiff's motion to strike the testimony for the reason that it related to tests conducted on the Sumner Steam Engine at a period almost a month after the accident and at a time when the plaintiff's plant had been repaired and the machinery in question renovated and operating under conditions dissimilar to those existing at the time of the accident. (Tr. 342 to 350). The grounds urged at the trial for the plaintiff's objection were:

> "Mr. Kelley: For the record—pardon me, Mr. McKeon, we object on the grounds that it's incompetent, irrelevant and immaterial, what occurred from August 2, 1946, on, by this witness or any other witness, with respect to the Sumner Steam engine, the main line shaft, and the number 4 paper machine, for the reason that the testimony shows that the machine and the main line shaft and the Sumner steam engine had been repaired, renovated and placed in working operation by July 29, and that the same or similar conditions did not prevail on August 2, 1946, when this witness is purported to have made his investigation as to what may have occurred at the time of the accident." (Tr. 344).

> "Mr. Kelley: At this time, if the Court please, the plaintiff moves to strike the testimony of the witness McKeon in toto for the reason that it affirmatively appears from the witness that he first came to the Inland Empire Paper Company plant on or about August 2, 1946, and conducted some tests there at a period almost a month after the accident in question, and some time after it is admitted that the plant had been repaired and

the machinery in question renovated and operating." (Tr. 350).

(3) The District Court erred in rejecting formal offers of proof that the Spokane and Seattle representatives of defendant Insurance Company admitted on or about August 4, 1946, after investigation of the accident, that the proximate cause, in their opinion, was the breaking of the belt on the Pickering Governor. (Tr. 163, 164, 165, 166, 238-240). The grounds urged at the trial for the plaintiff's objection were:

> "Mr. Kelley: If your Honor pleases, this fact is admitted by the defendants, I am sure, of paragraph 6 of our complaint, but they seek to admit it without prejudice, as they call it. Now, whether or not it is without prejudice is a legal question for the Court, and I do offer to prove by this witness, if permitted to testify, that he called in the Union Iron Works of Spokane with the knowledge, consent and approval of the defendant Hartford Insurance Company, and that the situation was appraised by the representatives of the Union Iron Works of Spokane, and that with the knowledge, consent and approval of the defendant Hartford Insurance Company the Union Iron Works of Spokane was given an order to make castings and line shaft bearings and other work that was necessary to the equipment under the circumstances, and that this was all done with the knowledge, consent and approval of the defendant, who had previously by oral announcements of its representatives Fullmer and Olinger advised this witness that the proximate cause of the damage and loss to the property in question was from the breaking of the governor belt, which fact is further confirmed by the letter in evidence from the defendant Hartford Insurance Company

under date of October 18, 1946. That's the formal offer of proof, for the record.

"Mr. Paine: I object to it, your Honor.

"The Court: The objection will be sustained." (Tr. 239-240).

Butterfly Valve

(4) The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of defendant showing certain experiments conducted July 7, 1946, upon the Butterfly Valve after the accident, which experiments were performed under conditions dissimilar to the operating conditions of the engine at the time of the accident whereby it was sought to be shown by the defendant that the Butterfly Valve could have leaked enough steam into the insured engine so that the paper machine could have operated even if the Brownell Overspeed Stop or the Handpull Safety Chain, or both, had functioned. (Tr. 329 to 332). The grounds urged at the trial for the plaintiff's objection were:

> "Mr. Kelley: Just for the record, we make the same objection, incompetent, irrelevant, immaterial, what happened in the tests after the accident and after the butterfly valve had been taken out and had been once more replaced in the line, for the reason that the same similar conditions did not prevail as at the time of the accident.
>
> "The Court: Overruled." (Tr. 329).

(5) The District Court erred in admitting and considering in evidence over plaintiff's objection testimony of an insurance inspector of defendant that he had been told by a stationary engineer of plaintiff

that "one time they had made paper for several hours with this Butterfly Valve in a closed position." (Tr. 279-280). The grounds urged at the trial for the plaintiff's objection were:

> "Mr. Kelley: Oh, I'd have to object to that. It's incompetent, immaterial, it's hearsay; it wouldn't be binding on the plaintiff if it were material, conversations that he might have had.
>
> "Mr. Paine: I think Mr. Wheeler was asked about it.
>
> "The Court: I don't recall specifically all these conversations, but isn't this one he was asked about on his cross-examination? Overrule the objection." (Tr. 279).

(6) The District Court erred in rejecting proffered testimony that another portion of the insured engine, in addition to the belt of the Pickering Governor, had in fact broken at the time of the accident, to-wit: part of the Handpull Safety Chain. (Affidavit of

Fred Beguelin, (Tr. 471; Tr. 503).

(7) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof, that on the 3rd day of July, 1946, while said policy was in full force and effect, the said Sumner Steam Engine overspeeded due to some undetermined cause which did not constitute an accident within the terms of said policy. (Findings of Fact No. 3, Tr. 465).

(8) The District Court erred in rendering and entering the final judgment and in concluding and hold-

ing in support thereof, that the Safety Stop on the Pickering Governor operated to bring the Sumner Steam Engine to an idling speed. (Findings of Fact No. 4, Tr. 466).

(9) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof, that either the Brownell Overspeed Stop or the Handpull Safety Chain, or both, had operated and the Butterfly Valve had been closed before any damage had been done to the plaintiff's property, but that due to the fact that the valve stem was binding in its packing, it did not completely close, but allowed the engine to continue to accelerate until the engine was brought to an idling speed by the breaking of the governor drive belt and the operation of the Pickering Governor Stop. (Findings of Fact No. 5, Tr. 466).

(10) The District Court erred in rendering and entering the final judgment and in concluding and holding in support thereof, that none of the damage sued for was caused by an accident to an object insured under the policy of insurance. (Findings of Fact No. 6, Tr. 466).

(11) The District Court erred in denying plaintiff's alternative motion for a new trial or for entry of plaintiff's requested findings and entry of appropriate judgment.

Summary of Argument

The belt driving the Pickering Governor of the insured Sumner Steam Engine broke. The Safety Stop on the Pickering Governor, which had been placed on it at the specific recommendation of the Insurance Company to stop the engine in the event that the belt did break failed to function because of a loose set screw in the arm that was supposed to trip the mechanism of the Pickering valve. The Pickering Governor immediately opened wide, speeding the Sumner Steam Engine, line shaft pulleys and connected Paper Machine so fast that the pulleys on the line shaft in the basement and two pulleys upstairs burst. The Brownell Overspeed Stop and the Handpull Safety upstairs both attached to the Butterfly Valve on the main steam line never functioned to prevent this excessive speed, although The Brownell Overspeed Stop had been set to shut the Butterfly Valve at a speed far below this runaway speed that the Sumner Steam Engine. The amount of the damage was stipuphysically broken by the employees of the Paper Company, who endeavored to make an emergency stop with it.

The line shaft was twisted and destroyed and the property of the Paper Company was damaged as a direct result of this runaway speed of the Sumner Steam Engine. The amount of the damage was stipulated by the parties to be $16,173.81, although the Insurance Company denied that an accident within the purview of its policy caused this damage.

Argument

I. Errors with Respect to the Admission and Rejection of Evidence. (1-5).

All the assignments of error which have been made by appellants necessarily require a minute examination of the evidence. For the convenience of the Court, we will discuss the five assignments relative to the admission and rejection of evidence together, because they all refer to certain experiments involving the Pickering Governor and the Butterfly Valve.

Experiments made out of the presence of the Court are competent evidence in a proper case, but before they can be admitted, it must appear that they were made under substantially the same conditions as existed at the time of the transaction in question. *Lasityr v. Olympia,* 61 Wash. 652, 112 Pac. 752. The offers of proof with respect to the Pickering Governor were rejected by the District Court, which rulings are also claimed to be erroneous, entitling appellant to a new trial at least.

Pickering Governor

The difference between the operation of the Pickering Governor at the time of the accident and at the time of subsequent tests a month later on August 3, was that there was a loose set screw in the mechanism of the Pickering Governor at the time the belt of the Pickering Governor broke; this loose set screw prevented the Pickering Governor from "tripping"; "tripping" would have prevented the runaway speed;

this loose set screw had been replaced by August 3, 1946, and the only thing the test on August 3, 1946, proved was that the Pickering Governor tripped at a time when a new belt had been placed upon the Pickering Governor of the Sumner Steam Engine and the loose set screw had been replaced and all machinery had been thoroughly repaired and had been running since July 29, 1946. It was undisputed that if the safety device on the Pickering Governor had tripped and operated properly after the belt broke, the Sumner Steam Engine could not have run away. A careful analysis of the evidence shows that this loose set screw at other times had prevented the Safety Stop on the Pickering Governor from operating properly. The testimony on this all important point was given by three witnesses, Wheeler for the Paper Company, Olinger and Fullmer for the insurance Company, and their testimony considered altogether shows the reason why the Safety Stop on the Pickering Governor did not work after the belt on the Pickering Governor broke. If the Safety Stop had worked, the Pickering Governor would have been in a "tripped" position.

Testimony of Wheeler

Wheeler, engineer and operator for the Paper Company, who came on shift a short time after the accident, testified that the Pickering Governor was not in a tripped position. He was the individual who had charge of the Sumner Steam Engine. He testified the reason the Safety Stop had not tripped after the

belt broke on the Pickering Governor was because of this loose set screw:

> "A. Well, the apparent reason was that that set screw, there was an old key in that little shaft that operates the trigger that kicks out the dog on the ratchet, which releases the governor and closes it, and that set screw had evidently worked loose enough so that this arm that comes down and engages with the rod that was fastened to the tightner pulley moved the rod, the rod was loose on the trigger shaft, so that it did not touch the dog on the ratchet enough to throw it out.
>
> "Q. That was the reason why the Pickering Governor didn't shut off automatically after the belt broke?
>
> "A. That's absolutely the reason***" (Tr. 171).

He was subjected to a thorough cross-examination by the respondent in an effort to show that the Pickering Governor must have tripped, but the cross-examination only confirmed the fact that it had not tripped and that the reason it had not tripped was because of this loose set screw. (Tr. 178, 179).

> "Q. On the 5th you made some tests with him?
>
> "A. Well, we looked it over, yes. I looked it over with a half dozen different men, not only my partner, but with Mr. Janecek and the insurance men also. We looked it over.
>
> "Q. And at that time you found that it didn't work?
>
> "A. Well, I found that the first time, the first thing.
>
> "Q. Well, you found that it hadn't worked, the first thing, but did you try it after that?

"A. Well, you could work it by hand.

"Q. You could work it by dropping the rider pully?

"A. No, not until after they tightened the set screw.

"Q. Now, let's get to this set screw. This set screw is a little screw that goes into this—what do you call it, the trigger arm?

"A. Well, yes.

"Q. That comes down and lies on the plate?

"A. Well it has an eye in the end.

"Q. It comes into a rod here and is fastened with a little screw that goes down and rests or bites into this arm, is that correct?

"A. That's correct.

"Q. And that's a little inset hexagon screw; you have to have a special wrench to loosen it or tighten it?

"A. No, the set screw in there was an ordinary set screw with a square head, which stood up; it wasn't a sunken set screw.

"Q. It wasn't a sunken set screw?

"A. Not at that time.

"Q. You feel quite sure about that?

"A. I am.

"Q. It had a little head on it that you could turn?

"A. A square head.

"Q. Could be tightened or loosened by anybody applying a wrench to it?

"A. That's right.

"Q. If anybody had touched that or loosened it it would be loosened up?

"A. It could be, if anyone would, but I don't know why anybody would; it was under that plate which holds the outboard bearing of the governor shaft. It was in a kind of a peculiar place to get at anyway. That's one of the reasons why it probably hadn't been looked after, was it being up there out of sight, and it was tight the day before, and it was tight when it was put on. It just naturally worked loose." (Tr. 178-179).

* * * * * * *

"Q. (By Mr. Paine): That screw could be loosened by applying a wrench to it and loosening it up?

"A. Certainly.

"Q. Do you think it could be loosened by merely operation of the machine itself?

"A. Vibration; there's a certain amount of vibration on those high speed engines.

"Q. And do you go around frequently and tighten it up, keep it tight?

"A. Well, probably not as often as we should have. I'll admit that on my own part, but those machines are in continuous operation 24 hours a day and a good deal of the time seven days a week.

"Q. And they require a constant tightening of that screw; it should be kept tight?

"A. There's lots of things that require tightening, and we do tighten them, absolutely, where it has to be done, absolutely necessary." (Tr. 180, 181).

This particular witness testified on cross-examination that he made this examination the day of the accident

and that he discovered that the Pickering Governor Safety Stop had not "tripped", although he had had occasion to observe it just the day before when it had tripped. (Tr. 183). This characteristic of the Safety Stop on the Pickering Governor tripping at times and not tripping at other times was not only observed by Wheeler at the time of the accident, but his testimony in this respect was unequivocally corroborated by the representatives of the Insurance Company who investigated two days after the accident.

Testimony of Insurance Company Representatives

Harry L. Olinger was the inspector of the Insurance Company who recommended that the Pickering Governor be equipped with the additional safety stop device that failed. (Tr. 266). He investigated the accident on July 5 and made three separate inspections of this Pickering Governor on the Sumner Steam Engine (Tr. 292). He could not understand himself why the Safety Stop on the Pickering Governor would work sometimes and not at others. (Tr. 293). Olinger tested the Safety Stop on the Pickering Governor two days after the accident in company with Wheeler four or five times and they could not make it work, (Tr. 276) although previously the Insurance Company representative had made it work. (Tr. 271).

That same afternoon he went back alone and still the Safety Stop on the Pickering Governor would not work.

> "Q. Now, when did you go back, or did you do anything further that afternoon of the 5th?

"A. Well, after Mr. Wheeler and I tested that, and was looking around there, I still kept thinking about this governor, and wondering what was the matter, so I went back myself, alone, and started to re-set this and test it myself, and I couldn't get it to trip either.

"Q. You couldn't get it working?

"A. No." (Tr. 277). (Tr. 293).

That evening his superior, Fred Fullmer, arrived and Olinger reported to him the results of these tests wherein the Safety Stop on the Pickering Governor worked sometimes and sometimes it did not. (Tr. 277).

Olinger in looking for a reason as to why the automatic Safety Stop on the Pickering Governor would sometimes work and sometimes would not never looked for any loose set screws. (Tr. 295). However, his superior, Fullmer, did look and did discover the loose set screw in the arm that was supposed to trip the mechanism of the Pickering valve. (Tr. 306). This completely corroborated the testimony of Wheeler of the Paper Company that at times the Safety Stop on the Pickering Governor would not trip and that when he, the first man on the scene after the accident, examined it, it was not in a tripped position. Olinger did not ask Wheeler about this when further investigation was made as to the condition of the Governor after the wreck, but he so informed the Paper Company, which in turn advised the Insurance Company on August 20 (Tr. 205) of what Fullmer himself had discovered on July 7. At that time, July 7,

Fullmer realized that a loose set screw would prevent the Safety Stop on the Pickering Governor from "tripping" and ordered a new screw, (Tr. 306) although the original screw was supposed to have been of a proper type. (Tr. 195). The District Court apparently failed to attach any importance to this testimony probably for the reason that the basis for his ruling was in part that even if the Safety Stop on the Pickering Governor had failed to work, the Brownell Overspeed Stop did work, or at least the Handpull Safety Chain worked so that the Butterfly Valve was closed partially. (Tr. 450, 451).

After Fullmer had made his investigation and before October 18, 1946, when the claim was formally denied by the Insurance Company, he reported to the Insurance Company that in his opinion the breaking of the Governor belt was the proximate cause of the loss and damage. (Tr. 324). Yet the District Court rejected all formal offers of proof that both the Spokane and Seattle representatives of the Insurance Company admitted on or about August 4, 1946, after investigation of the accident, that the proximate cause, in their opinion, was the breaking of the belt on the Pickering Governor. (Tr. 163, 164, 165, 166, 236 to 240). Such testimony would have shown the opinion of experts even if not binding upon the Insurance Company.

Almost a month after Fullmer's earlier investigation and apparently after his early report, Insurance

Company sent its representative, one Philip McKeon, from Hartford, Conn., to conduct certain tests on the Sumner Steam Engine when the Paper Company's plant had been completely repaired nad the machinery in question renovated (including the loose set screw on the Safety Stop of the Pickering Governor and the Handpull Safety Stop) and operating under conditions dissimilar to those existing at the time of the accident. An objection was timely made to his testimony. (Tr. 344) and a motion to strike it into toto was denied. (Tr. 350).

Butterfly Valve

Three days after the accident, on July 7, the Butterfly Valve was removed from the line by the Insurance Company and taken over to the machine shop. (Tr. 301). Four days after the accident certain tests were made by Insurance Company on the Butterfly Valve disconnected entirely from the steam line, calculated to show that the damper of the Butterfly Valve would not close even if the Brownell Overspeed Stop had operated normally at the time of the accident (which it did not). (Tr. 303, 327).

These tests purported to show that the reason the damper did not close 100% was that the packing surrounding the damper held it open one-eighth of an inch to three-fourths of an inch. (Tr. 303, 328). It is undisputed that these tests were conducted with the Butterfly Valve entirely disconnected at a time when the engine had no load on it, and was running free

because the damage hadn't yet been repaired to the line shaft. (Tr. 305). There were certain differences in testing the Butterfly Valve when it was disconnected and when it was under operating conditions.

(1) On the tests with the Butterfly Valve entirely disconnected from the steam line all loads were removed from the engine.

(2) However, under operating conditions the engine had to drive the line shaft and the belts and pulleys on each section of the proper machine. Thus there would be considerable friction load on the engine even when the individual clutches would be disengaged. The District Court apparently disregarded the undisputed testimony that the disengaging of the independent clutches on the machinery neither increased nor decreased the speed of the engine. (Tr. 114, 115) and would not take all loads off the engine as at the time of the "tests." (Tr. 305).

(3) These tests were conducted when the Butterfly Valve had been disconnected and idle for four days. The Butterfly Valve could not have been thoroughly warmed as it was in normal operation.

(4) The conditions under which the packing was tested with a comparatively cold valve were quite different than when the valve was hot under normal operation conditions. Even if the packing appeared stiff when the Butterfly Valve was tested, when it was cold for several days in the machine shop, that

was no true indication that it did not work perfectly free on the machine. Indeed, with a test of short duration, the Butterfly Valve could never be brought to a normal temperature and operating condition.

(5) According to the Insurance Company's testimony, it was only tested on one occasion, (Tr. 302, 304) and then the Insurance Company only tried once to stop the engine by tripping the Brownell and closing the Butterfly Valve. If it had been tested more thoroughly, the Butterfly Valve would have closed to one-eighth of an inch or 90% efficiency after it got warmer. It is undisputed that a Butterfly Valve of this type normally never closes to 100% and that one-eighth of an inch, or 90% efficiency, would have been enough to bring the engine to at least an idling stop. (Tr. 353, 354). The Master Mechanic, Beguelin, whose testimony was undisputed on the point, testified that the Butterfly Valve was 90% efficient and sufficiently tight to bring the engine to at least an *idling speed with all the load on.* (Tr. 350-354). Perhaps the significance of this testimony was not emphasized sufficiently to the District Court: that the Butterfly Valve, after the Brownell Overspeed Stop finally functioned by the moving engine belt coming in contact with its trigger, brought the engine to an idling speed even when there was no load on the engine, i. e., after the wreck had occurred and the line shaft was broken, and not the Safety Stop on the Pickering Governor.

We do not know what weight the District Court

gave to Olinger's testimony that Wheeler had told him one time that "they (meaning the Paper Company) had made paper for several hours with this Butterfly Valve in a closed position," but such narrative statements in any event would not have been binding upon the plaintiff. *Lever Bros. Co. v. Atlas Assurance Company,* 131 *F.* (2d) 770.

II. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE SUPPORTING THE FINDINGS OF FACT, NOR THE DECISION OF DISMISSAL, WHICH WERE ENTERED, BUT AFFIRMATIVELY INDICATES THAT THERE WAS AN "ACCIDENT" WITHIN THE PURVIEW OF INSURANCE POLICY.

Because assigned errors (6) to (11) all depend on the predominant question whether or not the Paper Company introduced substantial evidence supporting its claim, these numbered errors will be considered together seriatim.

(6) The language used in the insurance policy evidently contemplated some fracture of some part of the engine. This occurred. The belt broke on the Pickering Governor, also the lever arms and the hub of the Butterfly valve were broken as the result of the violence of the pull on the Handpull Safety Chain by the employees upstairs at the time of the accident.

It was undisputed at the trial that the Handpull Safety Chain did not work to close the Butterfly Valve because the draw pin to which it was attached

was never pulled through the loops of the lever arms of the Butterfly Valve. (Tr. 124-125).

Because this was undisputed, the Paper Company did not offer further evidence at the trial itself *why* the Handpull Chain had *not* closed the Butterfly Valve and thus shut off the steam to the engine. (Italics ours).

After the adverse ruling of the Trial Court, when it was apparent that the Trial Court had decided the case on an entirely different theory than had been advanced by either the Paper Company or the Insurance Company, this further evidence was proffered: that the violence of the pull on the Handpull Safety Chain of the No. 4 Paper Machine, which was operated from the floor above, had in fact broken the lever arm casting that held the pin, and that was the reason why the hand release had failed to pull the pin from the loops of the lever arm and thus close the Butterfly Valve. (Affadavit of Fred Beguelin—Tr. 471). The Trial Court rejected this proffered evidence in denying plaintiff's alternate motion for a new trial or for entry of plaintiff's requested Findings and entry of appropriate judgment thereon.

Even the defendant below in his argument before this motion was made conceded that if a portion of the Butterfly Valve broke that would be covered by the policy. (Tr. 428).

(7) The Sumner Steam Engine did not overspeed due to some "undetermined cause." The proximate

cause was the belt breaking on the Pickering Governor, which was an "accident" within the terms of the policy. The term "accident" was defined in the policy as follows by Schedule 6, Paragraph C:

> "C. As respects any object described in this Schedule, 'Accident' shall mean a sudden and accidental breaking, deforming, burning out or rupturing of the object or any part thereof, which manifests itself at the time of its occurrence by immediately preventing continued operation or by immediately impairing the functions of the object and which necessitates repair or replacement before its operation can be resumed or its functions restored, but the breaking, deforming, burning or rupturing of any gasket, gland packing, or shaft seal or diaphragm, shall not constitute an accident, nor shall the depletion of material in any part of the object, due to pitting, corrosion or wear, be construed as an accident."

This was the identical definition in the policy construed in *Ocean & Accident Guarantee Corp. v. Penick & Ford,* 101 F. (2d) 494. In that case there was the breaking of a copper strap and a fusing of its ends to the steel rotor which caused a ground in the rotor with a consequent impairment of function. While we have no case passing upon a similar question by the Circuit Court of Appeals for the Ninth Circuit, this decision from the Eighth Circuit is apropos to the extent that one of the principal questions at the trial was whether or not the occurrence in question constituted an accident within the meaning of the policy. It was there held that in determining the meaning of "accident" as used in machinery insurance against accidental breakdown, the question is

not what it might mean to a scientist or one skilled in the subject involved, but what it means to the average man. Here the belt of the Pickering Governor broke and a part of the Handpull Safety Chain. Not only was there a failure of substantial evidence supporting the decision of the Court that "the said Sumner Steam Engine overspeeded due to some undetermined cause which did not constitute an accident within the terms of said policy," but the record affirmatively showed an "accident" and what the cause was. What happened in logical sequence:

> a. The proximate cause of the overspeeding of the insured Sumner Steam Engine was the breaking of its belt that drove its governor. The direct result of this overspeed was the damage to machinery directly attached to the engine and the adjacent premises. The speed of the insured engine was supposed to be kept constant for the purpose of making paper by a governor which was called a Pickering Governor. This Pickering Governor was driven by a belt. (Exhibit 12). This belt was a part of the engine and governor. This belt broke. (Tr. 209, 321-322).
>
> b. After the belt driving the Pickering Governor broke, the safety stop on the Pickering Governor failed to function to prevent the insured engine from overspeeding. This safety stop had been placed upon the engine at the request of the insurance company, (Tr. 223, 224, 283) which recommended that the governor be fitted with a safety stop so that in case the governor belt should break, the governor valve would be closed automatically and the engine stopped from running away. (Plaintiff's Exhibits 15 and 17). However, this safety stop placed on the Pickering Governor to shut the steam supply off if the governor belt should break did not function at the time of the accident. (Tr. 209).

c. After the safety stop on the Pickering Governor failed, the Pickering Governor immediately opened wide overspeeding the insured engine and turned the line shaft pulleys and attached paper machine so fast (Tr. 98, 99, 77, 89-90, 94, 95, 111 and 112) that the pulleys on the line shaft and two pulleys on the paper machine upstairs burst. The line shaft was twisted and destroyed, and the plaintiff sustained damages in the amount of $16,173.81. (Plaintiff's Exhibit 14).

d. After the belt of the Pickering Governor of the insured engine broke, and after its safety stop failed to function, the connected line shafting operated the No. 4 paper machine as one unit at a sudden and excessive speed just before the break up of the line shafting and the machinery. This sudden and excessive speed came and could only come from one source, the insured Sumner Steam Engine. (Tr. 77, 89-90, 94, 95, 98, 99, 111 and 112).

e. After the belt of the Pickering Governor of the insured engine broke, and after the safety stop of the Pickering Governor failed to function, the other two control devices of the insured engine also failed to function and stop the sudden and excessive speed of the engine. (Tr. 209, 321-322). These other two control devices were a Brownell Overspeed Stop and a Handpull Safety Chain. (Plaintiff's Exhibits 8, 9 and 10, Tr. 136, 124-125, 134-135). With only this type of stop, should this mechanism fail, serious results were bound to follow. (Tr. 283). This was the reason why the insurance company had recommended that the paper company put a safety stop on the Pickering Governor. (Tr. 223, 283, Plaintiff's Exhibits 15 and 16). Both of these control devices, the Brownell Overspeed Stop and the Handpull Safety Chain, were attached to the butterfly valve on the main steam line coming into the insured engine. Either control device was supposed to close this butterfly valve, (Tr. 196-197, 207-

208, 220-221) which operated like an old-fashioned damper on an old-fashioned wood stove, and was used for emergency closing of the main steam line. The Brownell Overspeed Stop was a mechanically operated stop on the flywheel of the insured engine which was supposed to operate automatically to shut off the engine when it attained a certain set speed, usually about 10% higher than the maximum paper making speed, while the Handpull Safety Chain, which was also attached to the butterfly valve, could be operated manually. (Plaintiff's Exhibits 8, 11, Tr. 191-192). The Brownell Overspeed Stop was supposed to operate automatically if the Pickering Governor failed and the engine overspeeded.

f. The Brownell Overspeed Stop had been set to shut the engine off automatically at about 277 revolutions per minute (R.P.M.), or at a corresponding speed for the attached No. 4 paper machine of 700 lineal feet per minute. (Tr. 196-197). At the time of the accident the Brownell Overspeed stop never functioned and the insured Sumner Steam Engine was going at least 800 R.P.M., or almost three times the speed at which the Brownell Overspeed Stop had been set, and the No. 4 paper machine was driven faster than it had ever before been driven at an estimated speed of 2,000 lineal feet per minute. (Tr. 77, 89-90, 94, 95, 105, 111, 112, 122-123).

(8) Everything which has been stated with respect to assigned error (7) can be repeated with respect to this error. The belt breaking on the Pickering Governor caused the accident. Appellant does not contend that the loose set screw caused the accident. The belt breaking on the Pickering Governor caused the accident, but the reason why the safety stop did not operate to shut off the Pickering valve *after the*

belt had broken was the loose set screw. Further, this loose set screw is the reason why the judgment was against the weight of the evidence in holding that "the safety stop on the Pickering Governor operated to bring the Sumner Steam Engine to an idling speed."

This was a physical impossibility. If the safety stop did not trip at all (which was the case here because of the loose set screw) after the belt of the Pickering Governor broke, the engine would have continued to increase its speed, not idle. If the stop did trip, it would have closed the valve on the Pickering Governor and would have stopped the engine entirely. This automatic safety stop could not be adjusted to an idling speed.

> "Q. (By Mr. Paine): The Pickering governor stop; you can set that to either bring it down to an idling speed or bring it down to a full stop, couldn't you?
>
> "A. I didn't think you could do that to the automatic stop. You can adjust the Pickering governor so that it controls the speed within a certain range, but if the belt breaks on the governor and the automatic stop functions, it closes the valve on the Pickering governor and shuts off the steam from the engine.
>
> "Q. And if there's any leak from that valve it would escape through?
>
> "A. In the Pickering valve?
>
> "Q. Yes.
>
> "A. I doubt if there would be enough to turn the engine over.
>
> "Q. Even to keep it idling?

"A. Not even to keep it idling, through that valve. There might be enough leak through the butterfly to keep the engine operating." (Tr. 251-252).

What brought the insured engine to a final stop was the shutting off of the steam in the main line within a few seconds of the break up after the runaway speed by the engineer who was present.

"Q. And what did you do after the machinery started breaking up?

"A. I hesitated just a moment, wondering whether I should go down and try to do something about the engine, but the steam and water was flying there, and I thought the only thing to do then was to go back around to the head valve which is on the east side of the machine, or east side of those two engines, over under number 2 machine, and on the catwalk over num-2 engine, shut off that steam line that runs to number 4.

"Q. In other words, if I follow, you ran over to the east side on a catwalk over the number 2 engine and shut off the main steam line that goes to the number 4 engine?

"A. That's right." (Tr. 98-99).

(9) The other control devices had not operated nor had the Butterfly Valve been closed before the damage.

THE BROWNELL OVERSPEED STOP

The Brownell Overspeed Stop never functioned normally at the time of the accident, because the Sumner Steam Engine was going at least three or four times as fast as its running speed for the normal

paper making speed of 277 R.P.M. at which the Brownell Overspeed Stop had been set to operate. (Tr. 98-99). This excessive speed of the Sumner Steam Engine in turn drove the No. 4 Paper Machine faster than it had ever before been driven (Tr. 77-78, 89-90, 93-95, and 122-123) to a speed which one witness estimated was 2,000 lineal feet per minute before the machinery broke up. (Tr. 111 and 112). This was undisputed and conclusive proof that the Brownell Overspeed Stop never functioned normally at the time of the accident. Also it was undisputed that the maximum paper speed for the No. 4 Paper Machine was 690 and that consequently the Brownell Overspeed Stop should have operated on the Sumner Steam Engines when the No. 4 Paper Machine reached a corresponding speed of only 700 feet. (Tr. 191-192, 220-221).

There had been deliberate speed tests conducted prior to the accident by Insurance Company (Tr. 220-221) when the Brownell Overspeed Stop was set to stop the engine at a speed corresponding to 700 lineal feet per minute on the No. 4 Paper Machine. This paper speed of 700 lineal feet per minute was 10% higher than the maximum paper speed ever attained. (Tr. 74). None of the pulleys or the line shaft or any other machinery had ever been damaged by these previous overspeed tests when the Brownell Overspeed Stop had functioned at this paper speed

of 700 lineal feet. (Tr. 196-197, 207-208 and 220-221).

If the Brownell Overspeed Stop had functioned at the time of the accident, the speed of the Sumner Steam Engine would have been stopped when the No. 4 Paper Machine attained a paper speed of 700 feet, at which it was set, and that consequently the No. 4 Paper Making Machine would not have been driven as fast as the undisputed testimony by its workmen indicated it was, namely far in excess of 700 lineal feet per minute.

No evidence was offered by either party as to why the Brownell Overspeed Stop had failed to function. However, it is undisputed that the Insurance Company regarded the Brownell Overspeed Stop alone as not a sufficient precaution to prevent a runaway speed to the engine and that an additional or independent stop on the Pickering Governor was felt by it to be necessary. (Tr. 223-225 and Ex. 15). Prior to the accident, the Insurance Company felt that if the belt on the Pickering Governor, as shown in Exhibit 8, were to break, a very serious situation would be created with respect to the runaway speed of the engine, (Tr. 283), and that an independent or automatic safety stop should be placed on the Pickering Governor. This had been done.

Before this automatic safety stop was placed on the Pickering Governor, the only precaution to stop the speed of the engine in case the belt broke had been the Brownell Overspeed Stop. (Tr. 284). The

Brownell Overspeed Stop was supposed to shut off the engine at less than 300 R.P.M.'s but at the time of the accident, the engine was going, according to an eye witness, one of the engineers in charge of it, at least 800 R.P.M.'s, or almost three times the speed at which the Brownell Overspeed Stop was set and supposed to shut off. (Tr. 105).

As has been stated, the Brownell Overspeed Stop was also supposed to work automatically and was supposed to operate the butterfly valve which would close the main steam line, shutting off the steam. At the time of trial, the Court apparently thought that the only way the Brownell Overspeed Stop could be tripped was by the centrifugal force of the flywheel of the engine operating the trigger. (Tr. 161). Because this trigger was found in a tripped position after the accident, the Court concluded erroneously that the Brownell Overspeed Stop had worked normally. The trial court further concluded that the butterfly valve had not closed completely, thus allowing sufficient steam from the main line to escape and to operate the engine at a runaway speed (Tr. 452). There is absolutely no testimony in the record that steam came through the butterfly valve after it was closed in any amount sufficient even to operate the Sumner Steam Engine beyond an idling speed when it was hooked up to the No. 4 Paper Machine by means of the main line shaft and pulleys above described, to say nothing of the terrific runaway speed it attained at the accident.

HANDPULL SAFETY CHAIN

Much of what we have stated with respect to assigned error (6) can be repeated with respect to the Court's error in holding that the Handpull Safety Chain had operated to close the Butterfly Valve. This Court will keep in mind that none of the safety devices had functioned after the Pickering Governor belt broke, namely, the automatic safety stop on the Pickering Governor, the Brownell Overspeed Stop or the Handpull Safety Chain. The theory advanced by the Insurance Company was that the automatic safety stop on the Pickering Governor had functioned *after* the damage had occurred. But Trial Court's theory was that even if the automatic safety stop on the Pickering Governor did not function, either the Brownell Overspeed or the Handpull Safety Chain, or both, had functioned, closing the butterfly valve, but that there was enough steam coming through the butterfly valve nevertheless to cause the engine to run away. These two theories are diametrically opposed. There was absolutely no testimony in the record that the amount of steam which would come through the butterfly valve after it was closed would *even operate* the engine when it was hooked up to the paper machinery, much less overspeed the engine. On the other hand, the testimony of the Paper Compay was that there had never been enough steam that leaked through the butterfly valve to operate the engine, (Tr. 181-182), and its master mechanic, who had been associated with the company for 23 years in charge and responsible for the machinery (Tr.

187-188) stated that he had never known of an instance of overspeeding with the butterfly valve closed. (Tr. 197-198).

(10) Everything that has been said in support of assignments of error (7), (8) and (9) is authority for arguing that the damage was caused by an accident to an object insured under the policy of insurance.

(11) We feel confident that this Court will not find it necessary to consider the motion for a new trial in disposing of this case, but we submit that if it is considered by the Court, the errors pointed out were so manifest that a new trial must be granted in any event.

CONCLUSION

We are confident that this Court will agree with the position of the appellant that there was an accident, whether that term be taken in its ordinary layman's meaning or as defined in the policy, and that the Pickering Governor belt broke; that as a result of that breaking the insured engine speeded up and "ran away"; that the runaway speed accelerated to a point where it was communicated through the main drive belt to the line shaft and the machinery attached to the line shaft on the upper floor finally reached a speed that caused the pulleys to disintegrate through centrifugal force; that the District Court decided the case on a basis entirely unwarranted by the evidence, that is, he refused to believe the Brownell Overspeed Stop could be tripped in any manner other than centrifugal force (Tr. 360) and ignored an

overwhelming weight of evidence indicating that the runaway speed was far in excess of the point at which the Brownell was supposed to trip by centrifugal force, (Tr. 436) and thus erroneously placed a burden upon the appellant to prove why the Brownell Overspeed Stop had not tripped by centrifugal force. We likewise feel sure that this Court cannot but conclude, after an examination of the entire record, that the stipulated damages occurred as a result of the initial breaking of the Pickering Governor belt and that consequently recovery therefor is indicated under the provisions of the policy.

Respectfully submitted,

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